

Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:

Digital Broadcast Copy Protection

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MB Docket No. 02-231

**REPLY COMMENTS OF
THE CONSUMER FEDERATION OF AMERICA,**

February 18, 2003

CONTENTS

<u>INTRODUCTION</u>	1
<u>THE PROBLEM OF INTERNET TRANSMISSION OF HIGH QUALITY VIDEO DOES NOT EXIST AT PRESENT AND WILL NOT EXIST ANY TIME SOON</u>	1
<u>HYPOTHETICAL FUTURE PROBLEMS THAT MAY NEVER DEVELOP ARE NOT A SOUND BASIS FOR IMPOSING PERVASIVE REGULATION OF VIDEO EQUIPMENT</u>	3
<u>A NON-SOLUTION TO THE WRONG PROBLEM</u>	5
<u>CREATING NEW PROBLEMS BY INFRINGING CONSUMER RIGHTS</u>	5
<u>CREATING NEW PROBLEMS BY REGULATION DEVICES, RETARDING INNOVATION AND UNDERMINING COMPETITION</u>	7
<u>PERVASIVE AND CREEPING REGULATION OF VIDEO USES AND DEVICES</u>	8
<u>A RADICAL, ANTI-CONSUMER, ANTI-COMPETITIVE CHANGE IN FAIR USE AND INNOVATION POLICY</u>	8

Introduction

The proponents of the broadcast flag had an opportunity in their initial comments to make their case. They failed utterly to do so in a variety of ways. They failed to demonstrate the existence of a problem. There is no logical connection between the hypothetical they conjure up and the solution they propose. They offer a heavy handed, yet ill-defined regulatory scheme that provides little benefit but involves the Commission in regulating more products than it ever has, while it allows private companies to dictate the flow of technological development.

As a result, there is no basis for the Commission to adopt this rule. The Commission must conclude that the imposition of a technology mandate that requires a broadcast flag would do nothing to increase the availability of high quality content and speed the transition to digital television. Indeed, it will do a great deal more harm than good.

The Problem Of Internet Transmission Of High Quality Video Does Not Exist At Present And Will Not Exist Any Time Soon

There is no evidence that the problem exists today or will any time soon. Internet piracy of video content could be taking place through the analog hole (transformation of digital to analog and back, which washes out protections). It could be taking place based on the fact that there is a substantial amount of digital content already available that is in the clear. The comments filed by the MPAA made no such claim.

Failing to demonstrate the existence of an actual problem, the proponents of a broadcast flag fall back on hypothetical problems. The leading proponent of the flag – the Motion Picture Association of America (MPAA) – makes a sweeping claim.

Because it is transmitted in the clear, digital broadcast television is subject to an extraordinarily high risk of unauthorized redistribution over networks such as the Internet. The threat of such wide-scale piracy, if not addressed, will lead content providers to cease making their high-value programming available over broadcast television.¹

¹ “JOINT COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, ET. AL.,” *IN THE MATTER OF DIGITAL BROADCAST COPY PROTECTION*, BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, MB DOCKET NO. 02-330, DECEMBER 6, 2002., P. I (HEREAFTER, MPAA).

Broadcast television is a unique resource, justly cherished by million of Americans. It has been a staple of American culture since the 1950s. In addition to its importance domestically, broadcast television programming is a major United States Export that is tremendously important both to the American economy and to our prestige in the world. For all these reasons, broadcast television is a critically important resource that must be preserved...

A multi-billion dollar industry, employing thousands of individuals, broadcast television depends on an economic model that relies not on fees collected from the individual consumer, but on advertising revenue and on profit from resale rights both here and abroad...

The viability of the economic model upon which the broadcast television industry is built will be seriously undermined by rampant piracy of digital broadcast if television content is not protected. Unauthorized redistribution will inflict enormous damage on both of the pillars upon which broadcast television now stands. It would cripple advertising revenue by hindering broadcast content provider's ability to distribute content on a territorial basis and to adapt advertising to particular markets; and it would seriously damage critically important resale and syndication rights.

The result could be the destruction of broadcast television programming, as we currently know it.²

The Commission must therefore implement the proposed regulations attached to these Joint Comments mandating protection of digital broadcast television in a few types of consumer products...The Broadcast Flag is the most appropriate and efficient solution for the protection of digital broadcast television.³

These claims do not stand close scrutiny. Currently, distribution of high quality content over the Internet, which the rule seeks to prevent, is a daunting task. It is extremely unwieldy because of the massive size of the files necessary to convey the information that builds a high quality digital video image. At optimistic bit rates available to the public today, downloading high quality video content takes days, not hours.

There is no reason to believe that increases in bandwidth will make widespread sharing of high quality video content convenient any time soon. We understand that Intel and Microsoft want a 100 megabit pipe, but they are not going to get one in the near future. The best bit rate the typical American can get today is about 1.5 Megs and the cable and telephone industries

² ID., PP. 8-10.

³ ID., P. I.

charge about \$1000 a year to guarantee 3 Megs. At 3 Megs it still takes a day to download a movie.

Compression technologies that might speed the transfer process destroy the essential characteristic of copies that the industry claims makes digital technologies such a threat. They are no longer perfect copies. They put us back in the VCR world in some ways.

Hypothetical Future Problems That May Never Develop Are Not A Sound Basis for Imposing Pervasive Regulation of Video Equipment

The world in which studios sell content video cassettes to be used in VCRs is important to consider, since the MPAA is relying on the prediction of a future problem to convince the Commission to impose the broadcast flag requirement. Whenever the TV/movie industry faces technological change it makes dire predictions about the imminent doom of an important American icon and demands immediate action by policymakers to protect its business model. The MPAA made exactly the same predictions about the impact of the VCR on Hollywood film production and TV advertising revenues.⁴

But more than that, which is paramount to the national interest, the preservation of a huge trade asset. American films and television dominate the screens of the world and that just did not happen. It happened because of the quality and caliber and the imagination and the way people construct fragile imaginings that we call the American film.

But now we are facing a very new and a very troubling assault on our fiscal security, on our very economic life and we are facing it from a thing called the videocassette recorder and its necessary companion called the blank tape. And it is like a great tidal wave just off the shore. This video cassette recorder and the blank tape threaten profoundly the life-sustaining protection, I guess you would call it, on which copyright owners depend, on which film people depend, on which television people depend and it is called copyright...

Because unless the Congress recognizes the rights of creative property owners as owners of private property, that this property that we exhibit in theaters, once it leaves the post-theatrical markets, it is going to be so eroded in value by the use of these unlicensed machines, that the whole valuable asset is going to be blighted. In the opinion of many of the people in this room and outside of this room, blighted, beyond all recognition.

⁴ "TESTIMONY OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., *HOME RECORDING OF COPYRIGHTED WORKS*, BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE, COMMITTEE ON THE JUDICIARY, APRIL 12, 1982.

It means that when you are playing back a recording, which you made 2 days or whenever -- you are playing it back. You are sitting in your home in your easy chair and here comes the commercial and it is right in the middle of a Clint Eastwood film and you don't want to be interrupted. So, what do you do? You pop this beta scan and a 1-minute commercial disappears in 2 seconds.

If you are watching a Clint Eastwood film it is the most cheerful thing you can do. However, if you are an advertiser who has paid \$280,000 a minute to advertise, he feels a very large pain in his stomach as well as in his checkbook because it destroys the reason for free television, the erasure, the blotting out, the fast forwarding, the visual searching, the variable beta scans.

Even though Congress did nothing to impair the VCR, the member companies of the MPAA now earn about 40% of their revenue from the sale and leasing of videocassette tapes are now the largest single source of income for the Hollywood studios.⁵ In the 20 years since the MPAA made those dire predictions about the end of free over the air TV due to the destruction of advertising's value, the dollar value of video advertising increased five-fold. In real terms it grew by almost four percent per year.⁶ In fact it grew faster than real national income, increasing its share of gross domestic product by over 30 percent, or about 1.3 percent per year.

The solution to technological change is the adjustment of the business model, not an attack on the technology or an attempt to prevent it from changing people's economic activities and social behaviors. Advertisers are already shifting to a new form of product placement. The broadcasters need get over their knee-jerk, Luddite,⁷ anti-technology reaction and begin thinking about how to exploit the vast new opportunities that digital technology provides.

⁵ NADEL, MARK S., QUESTIONING THE ECONOMIC JUSTIFICATION FOR (AND THUS CONSTITUTIONALITY OF) COPYRIGHT LAW'S PROHIBITION AGAINST UNAUTHORIZED COPYING: SECTION 106, (SSRN WEBSITE, 2003), P. 19, CITING COMPAINE, BENJAMIN M. AND DOUGLAS GOMERY, WHO OWNS THE MEDIA?: COMPETITION AND CONCENTRATION IN THE MASS MEDIA (3RD ED., 2000), P. 411-412; VOGEL, HOWARD L, ENTERTAINMENT INDUSTRY ECONOMICS (5TH ED. 2001), P. 79.

⁶ LEVY, JOHNATHAN, MARCELINO FORD LIVENE, ANNE LEVINE, *BROADCAST TELEVISION: SURVIVOR IN A SEA OF COMPETITION* (OPP WORKING PAPER SERIES, SEPTEMBER 2002).

⁷ THE DICTIONARY (*WEBSTER'S COLLEGIATE DICTIONARY*, FIFTH EDITION, 1948; P. 595) TELLS US LUDDITES WERE "A BAND OF WORKMAN WHO TRIED TO PREVENT THE USE OF LABOR SAVING MACHINERY BY BREAKING IT, BURNING FACTORIES, ETC. -- SAID TO HAVE BEEN SO CALLED AFTER NED LUD, A HALF-WITTED MAN WHO ABOUT 1779 BROKE STOCKING FRAMES." THAT DEFINITION FITS THE ATTITUDE OF MOVIE STUDIO AND RECORD COMPANY COPYRIGHT OWNERS TOWARD DIGITAL TECHNOLOGY PERFECTLY. THEY DO NOT WANT TO PHYSICALLY DESTROY THE HARDWARE, AFTER ALL THIS IS THE DIGITAL AGE, BUT THEY DO WANT TO UNDERMINE

A Non-Solution To The Wrong Problem

We recognize that the analogy between the industry reaction to the VCR and the advent of digital. Compressed digital recordings would be of inferior quality, but could be duplicated repeatedly. A close look at the hypothetical problems that the industry fabricates indicates that its arguments wide of the mark. Not only is the existence of the problem dubious, the proposed solution – especially the broadcast flag – is highly suspect.

The broadcast flag won't stop serious commercial hackers and large scale peer-to-peer sharing (if the problems existed for video). Determined commercial pirates will hack around or find easier ways to defeat the digital retarding marks (like utilizing equipment that ignores it), as will sophisticated file sharing operations. It does not deal with legal, legacy devices that are already out there. It does not close the analog hole.

Ironically, the broadcast flag will affect almost none of the actual distribution of digital content. Almost 90 percent of American households now subscribe to cable or satellite services. These services deliver TV through a bit stream, not a broadcast signal. That bit stream is not "in the clear." Of course, the MPAA demands that the other means of distribution of TV programming also – cable and satellite – lock down content as well.⁸ The broadcast flag does little, but the plan is to restrict use of all broadcast video content, regardless of how it is distributed.

Creating New Problems By Infringing Consumer Rights

The broadcast flag is much more than a non-solution to a non-problem, it creates new problems in its own right. There are substantial monetary and non-monetary costs associated with this approach.

Even if the broadcast flag will do nothing more than restrict the retransmission of content over the Internet, that is a substantial imposition on the current rights of consumers to use

ITS VIRTUAL FUNCTIONALITY. THEY WANT TO RESTRICT THE USE AND USEFULNESS OF DIGITAL PLAYBACK MACHINES THEREBY CONTROLLING THE WAY CONSUMERS USE PRODUCTS THAT THEY HAVE LEGALLY OBTAINED.

content they have legally obtained. Ironically, because of the limitations on the ability to transmit high quality digital content over the Internet, the type of uses that the broadcast flag will prevent are exactly the types of uses that fair use is intended to promote. It is feasible to transmit only small snippets of high quality content, like a consumer who sees a glimpse of an old neighborhood might want to send that to an elderly relative.

The proposal does not stop there however. It inserts government into the most fundamental of consumer rights by giving the government the right to define the consumers “personal digital network environment.” The proposal gives the government the right to restrict the consumers use of networks with the consumer’s personal space, declaring as its goal “to prevent the unauthorized redistribution of unencrypted digital terrestrial broadcast content outside of the personal digital network.”⁹ The definition of the personal digital network environment is not precise, covering “the home or similar local environment.”¹⁰ The core of the definition “consists of all the rooms or areas within a consumer’s primary residence.”¹¹ The expression “similar local environment” expands the scope “to include a consumer’s car, boat, RV, or second home.”¹² The net effect is to put the government (or the industry) in the business of defining “various locations typically associated with a consumer’s home.”¹³

One major problem with the proposal is that “technologies to securely bind content to the personal digital network as it is being transferred between or among locations do not exist today.”¹⁴ Graciously, the MPAA and its joint commenters “invite and encourage the development of such technologies that could expand consumer choice, so long as content owners’ valuable rights in their content are protected.”¹⁵ In other words, the government is

⁸ MPAA, PP. 18-19.

⁹ MPAA COMMENTS, P. 26.

¹⁰ ID., P. 26.

¹¹ ID., P. 26.

¹² ID., P. 26.

¹³ ID., P. 26.

¹⁴ ID., P. 27.

¹⁵ ID., P. 27.

asked to go into the business of defining the consumers personal digital space, certain to be a daunting task, with technologies that do not exist. We have a simpler solution, do not infringe on consumer choice in the first place.

There is one final, implicit threat to consumer rights in the industry comments when they state that “Nor does the Broadcast Flag *itself* limit a consumer’s ability to make or move physical copies of broadcast content.”¹⁶ Imposing a broadcast flag requirement would make it much easier in the future to restrict the ability of consumer’s ability to make or move physical copies. We have no doubt that the industry will get to that next step in short order.

Creating New Problems By Regulation Devices, Retarding Innovation And Undermining Competition

The flag proposal opens a similar Pandora’s box of regulatory uncertainty on the producer side of the network. The industry duplicitously states that the “Broadcast Flag solution regulates a *minimum* number of products.”¹⁷ It goes on to state that “only products containing demodulators or modulators will be directly subject to the Commission’s mandate.”¹⁸ It hastens to point out that “pertinent products must be defined broadly – “we assume the Commission intended, that computer or “IT” products be regulated, as well as so-called ‘CE’ products [consumer electronic devices].”¹⁹ This certainly pulls every TV and is likely to pull most PCs under the rule. That is hardly a limited reach.

And, the reach does not stop there. The proponents of the flag demand that “certain other products – ‘downstream products,’ as described below, will be subject to the Commission’s mandate only if the product manufacturer voluntarily agrees to bind itself to comply.”²⁰ The industry shrouds the definition of “downstream products” in a great deal of mystery, but the simple choice is as follows. If your equipment – TV, PC, DVD, etc. – is going to

¹⁶ ID., P. 27, EMPHASIS ADDED.

¹⁷ ID., P. I, EMPHASIS ADDED.

¹⁸ ID., PP. 14-15.

¹⁹ ID., P. 14.

²⁰ ID., P. 15.

receive or display video content, it will have to comply with the flag requirement. In other words, participation in the multimedia environment of the digital information age will require a flag.

The process that the flag proponents outline for the approval of technologies raises many questions and poses severe problems. The flag opens the door to the manipulation of authorization to undermine competition. Certification of a new technology becomes a strategic asset by incumbent manufacturers of already approved devices or copyright holders. Entrenched copyright owners and incumbent technologies can challenge the certification of new devices, to undermine competition and slow innovation. The broadcast flag also raises interoperability and compatibility issues. Backward and forward compatibility are not guaranteed.

Pervasive And Creeping Regulation Of Video Uses And Devices

Given the number of problems that the broadcast flag does not address, the imposition of a flag requirement immediately raises the specter of creeping control, as other devices and other restrictions can be implemented through the bit reader implemented by a new set of gatekeepers who decide which technologies are acceptable.

At the same time, the proposed rules are shockingly pervasive and agonizingly ill-defined. It is quite clear that the proponents of the rule intend to regulate every device that can receive or play a video image – TVs, PCs, DVDs – yet the rule uses cryptic language to describe which devices will be included. The specter of creeping intrusiveness cannot be avoided. The proposal promises to provide the consumer with a personal digital environment in which copying and ease of use will be preserved. Yet, nowhere in the rule is the personal digital environment defined. Similarly, downstream devices are identified in a convoluted manner that opens the door to an ever-expanding sphere of regulation.

A Radical, Anti-Consumer, Anti-Competitive Change In Fair Use and Innovation Policy

The absurdity of the flag proposal at this point in time is overwhelmingly apparent. Not only is there no demonstrable problem (except in the crystal ball of the content owners), not only

does it fail to address the most serious problems that might develop, but proponents of the flag admit there is no technologically adequate solution (not if the personal digital environment is central to an equitable solution). The industry's approach is deceptively simple and unacceptable, lock the content down today, lay the groundwork for further restriction on use in the future, and invoke technology to restore fair use to consumers.

The imposition of a broadcast flag constitutes a radical change in fair use policy and the open ended, ill-defined regulatory scheme establish a framework for expanding infringement on consumer fair use rights. The fact that the flag could only address the smallest and least serious of the hypothetical problems the industry faces only reinforces our concerns that this is the initial phase of a pervasive attack on consumer fair use rights.

Today, consumers have the legal right to make convenient and incidental copies of copyrighted works without obtaining the prior consent of copyright owners. The principle of fair use allows consumers to use this material in this way, **unless the content owner can show that the copyright is being violated.**

Hollywood and the recording companies want to radically alter this approach to fair use. Essentially, they want to start from the assumption that all use, after the initial viewing, is illegal and then authorize only specific uses and devices. Ultimately, we fear that there is a very good chance that content owners will use the flag and similar technologies to "authorize" use on a device-by-device and use-by-use basis. There are permutations and variations on this approach, but they all amount to the same thing, a reversal of the principle of the consumer right of fair use. It can severely infringe the consumer's rights of reasonable use of legally obtained material – back-up, time and place shifting, sharing, transforming and experimenting. Today the principle is fair use and innovation first, litigation later.

This is an anti-consumer policy that will distort and stunt the digital age. By reducing functionality, this approach will slow the growth of digital media down and leave the new digital media far less innovative and consumer-friendly than they could be. A new technology that was

supposed to empower consumers and enhance their experience would be turned on its head by the proposed restrictions on the ability to record digital programming for personal use.

Ultimately, in our democratic society, copyrights, like all other rights, depend upon the voluntary compliance of the vast majority of citizens with the rule of law. Technology will not solve the problem. Even senior analysts at Microsoft, the leading anti-piracy advocate in the world, have concluded that the Darknet is an inevitable part of the Internet.²¹

A balanced solution must start from the proposition that consumers are not criminals and offer them more functionality under pricing plans that are reasonable, promoting legal activities that meet consumer needs at economically attractive prices. A balanced program would include enforcement of existing laws and reinforcement of social norms supporting legal behavior.

Instead of a Luddite, knee jerk defense of the old business model in opposition to the new technology, the industry must adapt its business model to the technology. That is what happened with the VCR. A decade of analysis of the new digital media convinces me that open standards and networks that afford consumers maximum choice, encourage use and promote unfettered innovations by both consumers and producers best serve consumers and the economy. After the industry is done resisting change, the more sharp-witted will figure out how to make money in the new environment because there are more users and uses.

²¹ PETER BIDDLE, PAUL ENGLAND, MARCUS PEINADO, AND BRYAN WILLMAN, *THE DARKNET AND THE FUTURE OF CONTENT DISTRIBUTION*,